

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of

SCRIPPS HOWARD BROADCASTING
COMPANYFor Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

FOUR JACKS BROADCASTING, INC.

For a Construction Permit for
Television Facility on
Channel 2 at
Baltimore, Maryland

MM Docket No. 93-94

File No. BRCT-910603KY

File No. BPCT-910903KE

To: The Honorable Richard L. Sippel
Administrative Law Judge

DEC - 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**PETITION TO REOPEN
THE RECORD AND ENLARGE THE ISSUES****FOUR JACKS BROADCASTING, INC.**Martin R. Leader
Kathryn R. Schmeltzer
Gregory L. Masters

Its Attorneys

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1255 23rd Street, N.W.
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(202) 659-3494

Dated: December 8, 1993

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SUMMARY

For many years, the Commission has emphasized on numerous occasions that it will not tolerate misrepresentations or lack of candor by its licensees -- either at hearing or in the discovery process. In this proceeding, Emily Barr, a managerial-level employee of Scripps Howard's Station WMAR-TV, Baltimore, Maryland, and the chief witness concerning the "renewal expectancy" issue, made serious misrepresentations during her testimony at the November 8 and November 9, 1993 hearing sessions.

Ms. Barr disclosed at hearing that correspondence she initiated with NBC in August 1992 had been preserved in WMAR-TV's files all along. Earlier, at her deposition in July 1993, Ms. Barr had maintained that she no longer had the correspondence. Furthermore, Ms. Barr revealed at the hearing that a former employee of WMAR-TV, Janet Covington, made handwritten notes in the summer of 1992, presumably based on Ms. Covington's calendar, which were used in 1992 to prepare an ascertainment exhibit for hearing. Ms. Barr further testified that she put Ms. Covington's notes in a pile at WMAR-TV where they remained until she eventually threw them out and she never gave the notes back to Ms. Covington. Yet in earlier representations to Four Jacks and to the Commission, Ms. Barr and Scripps Howard had claimed that Ms. Covington "had kept these notes in her possession when she left the station [in December 1991]; that they were thrown away after their use in the summer of 1992, that these notes "were not retained in any files at WMAR-TV;" and that Scripps Howard had "recently contacted Ms. Covington to ascertain whether she

possessed any of these notes."

These matters are highly significant because they relate to Scripps Howard's attempt one-year-after-the-fact to manufacture an evidentiary showing to be used at hearing. The petition demonstrates that Scripps Howard deliberately misrepresented and obfuscated the facts to preclude a full inquiry concerning its ascertainment efforts and the documents underlying such efforts.

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To: The Honorable Richard L. Sippel
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**PETITION TO REOPEN
THE RECORD AND ENLARGE THE ISSUES**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.229 of the Commission's rules, hereby petitions the Presiding Judge to reopen the record in this proceeding and specify the following issues against the application of Scripps Howard Broadcasting Company ("Scripps Howard"):

- (1) To determine whether Scripps Howard Broadcasting Company has made misrepresentations of fact and/or lacked candor in connection with this proceeding.
- (2) To determine, in light of the evidence adduced under the foregoing issue, whether Scripps Howard Broadcasting Company possesses the requisite qualifications to be a Commission licensee.

I. **THIS PETITION IS TIMELY FILED AND MEETS
THE TEST FOR REOPENING OF THE RECORD**

1. The facts giving rise to this petition came to light during the recent hearing in this proceeding which commenced on November 8, 1993 and ended on November 16, 1993. Four Jacks received the hearing transcripts on which this petition is based on November 23, 1993. This petition is timely filed within fifteen (15) days of Four Jacks' receipt of the transcripts and thus meets the requirements of Section 1.229(b)(3) of the Commission's rules. Moreover, the petition raises a question of "probable decisional significance and such substantial public interest importance" as to independently warrant consideration. See Section 1.229(c).

2. This petition also meets the test for reopening of the record. The Commission has consistently held that a petition to reopen the record must be supported by newly discovered evidence; that the facts relied upon must show that the petitioner could not with due diligence have known or discovered such facts at the time of hearing; and that the new evidence would, if true, affect the decision. See The News Sun Broadcasting Co., 27 FCC 2d 61 (1971).

3. The factors set forth in the News Sun case are present here. Ms. Barr's testimony during the November 1993 hearing session is the basis for this petition. Moreover, Four Jacks could not have discovered these facts earlier because Scripps Howard deliberately withheld relevant evidence as discussed herein. Finally, the new evidence does affect the decision in this proceeding since it demonstrates lack of candor and

affirmative misrepresentation by Scripps Howard in this case. Accordingly, the record should be reopened to consider the facts presented here. See Madalina Broadcasting, Inc., FCC 93M-68 (ALJ, released February 11, 1993) (record reopened and issues enlarged to include a misrepresentation/lack of candor issue based on testimony of Melanie Bruton at a May 1992 hearing session); see also Lamar Life Broadcasting Co., 29 RR2d 325 (Rev. Bd. 1974) (record reopened to determine whether an applicant violated Rule 1.65 by failing to report certain business relationships of a principal and whether false statements or misrepresentations were made in the proceeding with respect to such business interests).

II. THE FACTUAL BASIS FOR THE REQUESTED MISREPRESENTATION/LACK OF CANDOR ISSUE

4. The record evidence already adduced in this case reveals that Scripps Howard lacked documentary evidence of ascertainment efforts prepared contemporaneously with the license renewal period at issue in this case (May 30, 1991 - September 3, 1991). As a consequence, in the summer of 1992, Emily Barr, then Director of Broadcast Operations at WMAR-TV, commenced a massive effort to construct a showing as to how Scripps Howard ascertained community problems, needs and interests between May 30 and September 3, 1991. Those efforts included (a) contacting NBC to determine the programs the network aired that might have been responsive to the 1991 problems, needs and interests of Baltimore and (b) attempting to construct "community leader ascertainment interviews" by examining, among other things,

the notations in the 1991 calendars of certain WMAR-TV staff members. It is in the context of this 1992 effort to construct a 1991 ascertainment showing and Four Jacks' efforts to explore this area that the misrepresentations in question arose. They are serious misrepresentations because Scripps Howard had a definite motive to misrepresent -- Scripps Howard desperately needed to establish that its 1991 ascertainment efforts were sufficient to warrant a license renewal expectancy. The misrepresentations fall into two categories as described below and the pattern of similar conduct is significant.

A. THE CORRESPONDENCE WITH NBC

5. On July 16, 1993, Emily Barr, who had recently become the Acting General Manager of WMAR-TV, was deposed on the renewal expectancy issue. During her deposition, Ms. Barr was questioned about various documents that had been produced by Scripps Howard in response to Four Jacks' June 11, 1993 Motion for Production of Documents. First she was asked about a set of documents entitled "Release Schedule 1990-91 Season." Ms. Barr said the documents were prepared in October 1991 by NBC Television and that she had requested them from NBC after being asked to do so by counsel. (See Appendix A, Dep. Tr. 99-105). She was asked if she wrote any kind of a letter to NBC asking for this information and she responded "No, I did not. I made a phone call." (Id. at Dep. Tr. 105). Next, she was asked about a set of documents entitled "25 August 1992, Sort Media." The representative document in question had the words "Supreme Court" on the right-hand side. Ms. Barr said this was representative of a number of things she

received from NBC. On advice of counsel she had asked NBC for synopses of news programming related to issues and concerns that were relevant to the Baltimore market (Appendix A, Dep. Tr. 105-06). She then indicated that the telephone call she made to NBC was actually in August 1992 (Appendix A, Dep. Tr. 108).

6. Ms. Barr was asked the following series of questions at her deposition:

Q. You mentioned that you gave NBC a list of issues?

A. Yes.

Q. Was that in writing?

A. No, it was not. Actually, it was faxed to them.

Q. Would you have a copy of that fax?

A. No, I don't.

Q. Do you know what the issues were that you asked for?

A. Yes. They were the issues that were on our programs issues lists from second quarter and third quarter 1991.

(Appendix A, Dep. Tr. 109) (Emphasis added).

7. At the end of the deposition, Bureau counsel asked Ms. Barr the following question:

Q. Based upon your deposition today, does that bring to mind any documents that you may have seen and perhaps overlooked that you may now want to give to counsel?

A. As of right now?

Q. As of this moment?

A. No.

(Appendix A, Dep. Tr. 144).

Ms. Barr signed her deposition without changing these responses.

8. On October 20, 1993, Four Jacks submitted to the Presiding Judge a Request for Issuance of Subpoena Duces Tecum which sought to require NBC to produce the correspondence from August 1992 that Ms. Barr claimed she did not have. By Order, FCC 93M-672, released October 22, 1993, the Presiding Judge denied the subpoena request. Four Jacks thereupon filed a Request for Permission to File an Appeal. In an Order, FCC 93-678, released October 27, 1993, the Judge set a prehearing conference for 9:30 a.m. on October 27, 1993 and ordered Scripps Howard to file a responsive pleading to Four Jacks' Request for Permission to File an Appeal by 12:00 noon on October 26, 1993.

9. In response to the Judge's Order Scripps Howard filed on October 26, 1993 a pleading entitled "Opposition to Request for Permission to File an Appeal of the Order Denying the Request for Issuance of a Subpoena Duces Tecum." In that pleading, Scripps Howard argued that Four Jacks' Request for Permission to Appeal should be denied because "the distraction and likely delay would significantly prejudice WMAR-TV. . . ." See Opposition, Appendix B at p. 3. Scripps Howard's Opposition stated:

Four Jacks, therefore, was aware of the possible existence of the documents sought by the subpoena and that those documents were not in the possession of WMAR-TV over three (3) months ago. . .

(Appendix B, p. 2) (emphasis added).

Four Jacks' subpoena seeks documents for a broad time period that may or may not exist. Even if the subpoena were issued, a search for the documents is likely to take some time and cause delay.

(Appendix B, p. 3).

10. The prehearing conference was held as scheduled at 9:30 a.m. on October 27, 1993. At the conference, Scripps Howard revealed that it had the correspondence in question between NBC and WMAR-TV that was responsive to the subpoena request (Tr. 410). After this startling revelation, the Judge ordered from the bench that the documents be immediately turned over to Four Jacks. (Tr. 415).

11. At the November 9, 1993 hearing session, Ms. Barr was asked about the documentation she received in 1992 from NBC (Four Jacks Ex. 19). The following testimony ensued concerning her correspondence with NBC:

Q. And what did you do with the correspondence with NBC? Did you keep that at the station?

A. The -- are you talking about the memo that's Exhibit ---

Q. Exhibit 19.

A. -- 19?

Q. Right.

A. It went into a file at the station.

Q. And did it remain in that file at the station?

A. Yes, it did.

Q. Until you were asked to produce it in this proceeding?

A. That's correct.

Q. And that was as of October -- as of the judge's ruling about a week ago?

A. I think. I don't remember the date, but yes, it was recently.

(Appendix C, Tr. 769) (emphasis added).

12. Thus, whereas Ms. Barr claimed at her deposition that she did not have a copy of her correspondence with NBC, at the hearing she admitted that it has been in a file at the station all along! It is also clear that Scripps Howard's October 26, 1993 Opposition to Four Jack's request to appeal the Order denying the subpoena request contained false and misleading statements. That Opposition represented that (a) the documents were not in the possession of WMAR-TV; that they might not even exist; and (c) that a search might take time and cause delay to the prejudice of WMAR-TV. In fact, Scripps Howard had the correspondence all along and produced it almost immediately after the prehearing conference on October 27th. Moreover, as set forth in Subsection B below, similar misrepresentations occurred with another set of documents that were equally critical.

B. THE COVINGTON NOTES

13. Ms. Barr testified at the hearing that during the summer of 1992 she was asked by counsel to put together an exhibit on ascertainment. She then spoke to Arnold Kleiner, then WMAR-TV's General Manager, Maria Velleggia, the Director of Public Relations, Janet Covington, the Director of Public Affairs who had left the station in December 1991, and possibly Howard Zeiden, the former Director of Sales and Marketing. She asked

these individuals to retrieve their personal calendars and any information they might have with respect to ascertainment interviews (Tr. 576-77). The only people who had any information were Ms. Barr herself, Arnold Kleiner, Maria Velleggia and Janet Covington (Tr. 577). Ms. Barr obtained calendars from Mr. Kleiner and Ms. Velleggia, as well as her own calendar. According to Ms. Barr, Ms. Covington said that Barr would not be able to interpret her calendar and Covington wasn't comfortable giving Barr the calendar (Tr. 591). Ms. Barr testified at the hearing that Ms. Covington instead wrote down in long-hand in 1992 the meetings she had supposedly held in 1991, who they were with, and what was discussed in general. Ms. Barr received Ms. Covington's notes during the summer of 1992. At that time she used the calendars, Ms. Covington's notes and recollections to prepare Attachment E to her direct case testimony -- the attachment that purports to reflect ascertainment interviews by WMAR-TV staff with community leaders during the 1991 renewal period and the programming responsive thereto. A number of the purported ascertainment interviews contained in Attachment E to Ms. Barr's direct case exhibit were based solely on Ms. Covington's notes (See Scripps Howard Ex. 3, Attachment E and Tr. 592).

14. Janet Covington was never identified as a witness on the renewal expectancy issue by Scripps Howard and the only reference to any "notes" was contained at the end of a letter dated July 13, 1993 from Scripps Howard's counsel which accompanied additional documents produced for the first time on

the day of Terry Schroeder's deposition (the first in this proceeding). The letter stated:

Finally, Janet Covington, the former public relations director of WMAR-TV who retired in December, 1991, at one time possessed personal notes that recorded various ascertainment meetings in which she participated during the relevant period. These notes were not retained in any files at WMAR-TV. Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes and determined that she did not.

(Appendix D, p. 2) (Emphasis added). The letter did not indicate that Ms. Covington had prepared her notes in 1992 or that Scripps Howard had prepared a listing of purported ascertainment interviews in 1992 based on Ms. Covington's notes before they were discarded.

15. It was not until Scripps Howard exchanged its direct case exhibits on September 13, 1993 that any significance could be attached to Ms. Covington's "notes" and, once again, there was no evidence that the notes were prepared for the first time in 1992. At footnote 6 of her direct case testimony (SH3-16), Ms. Barr stated:

The material in Attachment E was originally prepared in 1992 under my direction from information gathered by individuals working under my supervision. In preparing the attachment, I relied upon my own calendar and recollections and the calendars and recollections of Arnold Kleiner and Maria Velleggia. In addition, I relied upon discussions with and notes of Janet Covington, the former Public Affairs Director. At that time, Ms. Covington already was a former employee of the station who had volunteered to help me on her own time and who had kept these notes in her possession when she left the station. It did not occur to me to preserve Ms.

Covington's handwritten notes after our discussions.

(See Appendix E).

16. At the November 8, 1993 hearing session, Ms. Barr was questioned concerning the Covington notes:

Q. You referred to some handwritten notes that Ms. Covington had.

A. Yes.

Q. What did you do with those handwritten notes?

A. I threw them away.

Q. When did you throw them away?

A. In the summer of 1992.

Q. How do you know you threw them away in the summer of 1992?

A. Well, Janet Covington was -- had been at the station for a very long time and did everything long-hand, and her handwriting, to be polite, was difficult to read. I had gotten used to being able to read it, but I didn't -- it never occurred to me at the time that I would need this or that anybody would even be able to decipher the way in which she scribbled things on paper. So after discussing them with her and going over what I needed and pulling it out for this document, I then saw no further need for them so I did not keep the notes.

Q. When you say you did not keep them, did you give them back to Ms. Covington or --

A. No, I, I --

Q. -- you just tossed them away?

A. I threw them in the wastebasket.

Q. And you didn't think that you should preserve them?

A. It never occurred to me.

Q. Did you consult with anybody before you threw them away?

A. No, because it didn't occur to me.

(Appendix C, Tr. 582-83) (emphasis added). Following this testimony and some further questioning by counsel for Four Jacks as well as by the Judge, the Judge ruled that Scripps Howard must turn over that portion of the earlier draft of the Attachment E which reflected the information provided by Ms. Covington. (Appendix C, Tr. 593).

17. Scripps Howard turned over the material that the Judge ordered to be produced at the beginning of the November 9, 1993 hearing session. It was during that hearing session that the subject of Attachment E, containing the purported 1991 ascertainment interviews, came up. The following testimony ensued:

Q. . . . [w]hen you finished with the calendars what did you do with them?

A. I think I stacked them up somewhere in my office.

Q. They were filed?

A. At that point it wasn't in a file. It was just on the floor.

Q. And did they remain there until 1993?

A. No. In fact, at one point I gave them back to the individuals who had lent them to me.

Q. Approximately when was that?

A. Sometime in the latter part of 1992.

Q. Now, when you finished with Ms. Covington's notes where did you place them?

A. Probably in that same pile.

Q. And how long did they remain in the same pile?

A. Well, the pile grew substantially as I worked on the gathering of these documents and because this particular ascertainment exhibit was going through several metamorphoses. I, I would -- as I -- as we made changes to it and updated it I would discard the older versions of it. I didn't -- I was just getting confused by having too many copies of the same thing. So at some point along those -- at some point along that continuum I threw the notes away because it at that point didn't seem to me to be necessary to keep them.

Q. And do you recall when that was in the continuum?

A. I really don't recall.

(Appendix C, Tr. 666-67).

* * * *

Q. Now, do you recall personally discarding the notes?

A. I, I know that I threw away a lot of paper during that period of time, that a lot of it was handwritten notes and things of that nature and, and I also recall filing a lot of paper. I don't specifically recall throwing away those notes, but I generally recall that I was getting rid of what I thought was unnecessary information.

Q. Did you ever give Ms. Covington's notes back to her?

A. No, I did not.

(Appendix C, Tr. 668-69.) (emphasis added).

18. Significantly, neither the matter concerning the communications with NBC nor the matter involving the Covington notes could have been delved into during depositions because Scripps Howard deliberately hid both. Ms. Barr first testified at her July 1993 deposition that she only made a phone call to NBC. It was only after repeated questions that she admitted that she sent a letter to NBC by fax, and then she denied having a copy of the fax.

19. Similarly, the references to Ms. Covington's notes were obscured. The July 13, 1993 letter delivered to Four Jacks on the day that depositions commenced contained the first evidence that Ms. Covington had ever made any notes and that letter claimed that the "notes were not retained in any files at WMAR" and Ms. Covington did not have the notes. (See Appendix D). Ms. Covington was never identified as a possible witness by Scripps Howard, and it was not until the exchange of Scripps Howard's direct case exhibits that there was any indication that Scripps Howard intended to rely on evidence based on the missing notes.

20. Indeed, the July 13, 1993 letter from Scripps Howard's counsel is blatantly candorless at best. Ms. Barr testified clearly that she retained Covington's notes after they were given to her, and she never gave them back to Covington. Thus, the letter's statement that the "notes were not retained in any files at WMAR" was an outright misrepresentation. In addition, Scripps Howard's claim to have recently contacted Ms. Covington in an effort to obtain the notes is incredible disingenuous, because Barr had the notes at all times before discarding them. Furthermore, Barr lied in her direct case testimony with respect

to the Covington notes. She testified there that Covington "had kept these notes in her possession when she left the station [in December 1991]" -- when in fact Covington did not even prepare her notes until the summer of 1992, when Barr first began her search for Covington's calendar. (Appendix C, Tr. 584, 659).

III. THE LEGAL PREDICATE FOR THE REQUESTED
MISREPRESENTATION/LACK OF CANDOR ISSUE

21. As the Commission has emphasized on numerous occasions, "[i]t is fundamental to the regulatory process that the Commission be able to rely on the representations of those whom it licenses and those who come before it seeking licenses. Therefore, the Commission must demand candor from those who come before it and must refuse to tolerate deliberate misrepresentations. Nick J. Chaconas, 28 FCC 2d 231, 233 (1971); WMOZ, Inc., 36 FCC 202 (1964), aff'd 3 FCC 2d 637 (1966); WOKO, Inc., 329 U.S. 223 (1946). Moreover, "[t]ruthfulness and full candor are as much expected in discovery as they are with respect to submissions to the Commission itself." Kate F. Thomas, FCC 93R-54 (Rev. Bd., released October 28, 1993) citing Edwin A. Bernstein, 6 FCC Rcd 6841, 6844 n.6 (Rev. Bd. 1991) and Capitol City Broadcasting Co., 8 FCC Rcd 1726, 1735 n. 1 (Rev. Bd. 1993).

22. The facts set out in this petition demonstrate that Scripps Howard made repeated misrepresentations and lacked candor during the course of discovery and during the hearing itself. As discussed earlier, Scripps Howard had a motive to misrepresent because it totally lacked ascertainment documentation prepared contemporaneously with the relevant license renewal period.

23. Commission case precedent fully supports addition of the requested misrepresentation/lack of candor issue. In Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 73 RR2d 226 (D.C. Cir. 1993), the Court affirmed the Commission's disqualification of Garden State under a lack of candor issue. The Commission found that Garden State deliberately withheld evidence establishing the date of its organizational meeting. In Omaha Channel 54 Broadcasting Group, Ltd. Partnership, 64 RR2d 1010 (Rev. Bd. 1988), rev. denied FCC 88-313, released October 19, 1988, the Review Board held that Channel 54's repeated failure to respond truthfully to valid discovery requests demonstrated a disqualifying intent to deceive the Commission. As the Board observed, "the submission of misleading, or untruthful responses to discovery requests is fully as serious as an untruthful response made directly to the Commission and, standing alone, can lead to disqualification." Id. at 1016. In Richardson Broadcast Group, 7 FCC Rcd 1583 (1992) recon. denied, FCC 93-132, released March 11, 1993, aff'd (D.C. Cir. 1993), the Commission upheld the disqualification of an applicant who lacked candor during the hearing.^{1/}

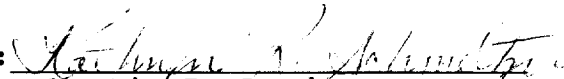
^{1/} Indeed, there is sufficient evidence in the record to disqualify Scripps Howard even without addition of an issue. See Richardson Broadcast Group, supra; Maria M. Ochoa, 72 RR2d 1191 (1993).

CONCLUSION

Accordingly, for the reasons set forth herein, the requested issues should be added against the application of Scripps Howard Broadcasting Company.^{2/}

Respectfully submitted,

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Dated: December 8, 1993

3070-014.P18

^{2/} Where an applicant, against whom charges of misconduct have been raised, has within its peculiar knowledge the facts regarding the alleged misconduct, both the burdens of proceeding and proof should be placed on the applicant. See TeleSTAR, Inc., 64 RR2d 1444 (1988).

APPENDIX A

COPY

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BEFORE THE

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FEDERAL COMMUNICATIONS COMMISSION

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WASHINGTON, D.C. 20554

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For a Construction Permit for:

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a New Television Facility :

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Maryland :

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Friday, July 16, 1993

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Washington, D.C.

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Deposition of

18

EMILY L. BARR

19

a witness, was called for examination by

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counsel for Four Jacks Broadcasting, at the

21

law offices of Fisher, Wayland, Cooper and

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Leader, 1255 Twenty-Third Street, N.W.,

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1 they go about picking a particular case, I
2 believe, really depends on the willingness of
3 the individual to appear on television. The
4 general interest of that type of case to our
5 audience, et cetera.

6 Q. I'd like to show you some documents
7 that are entitled, "Release Schedule 1990-91
8 Season," and there is a date in the upper-right
9 hand corner that says, "October 2," it should
10 say, "1991." This one is cutoff a little bit.
11 These are excerpted pages from a lengthier
12 block report that we got that is approximately
13 an inch or so thick. Have you seen this
14 document before?

15 A. Yes, I have.

16 Q. Do you know when this was prepared?

17 A. It was prepared in October of 1991.

18 Q. Do you know who prepared this?

19 A. I don't know the name of the
20 individual. It was prepared by NBC television.

21 Q. Is this something that you routinely
22 get from NBC television?